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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.1538 OF 2005
IN
SUIT NO.3835 OF 1996

Ramesh Shetty ... Plaintiff

V/s.

Suleman Valimohammed & Anr. ... Defendants

Mr.D.D. Madon with Mr.G.Kothari and Prateek Pawar for Plaintiff
Mr.M.A. Dharmaraj for Defendants

CORAM: **SMT.NISHITA MHATRE, J.**

DATED: **JULY 18, 2006**

P.C.:

. The present Motion has been taken out for setting aside the decree dated 20.7.2004 which has been passed ex-parte.

2. The Defendants are the legal heirs and representatives of the original defendant Aishabai Haji Mammuni. The original defendant had executed the power of attorney in favour of one Pervez Anwar Khan. The original defendant expired on 21.2.1997. The advocate was informed of the death of the advocate. The advocate informed the Constituted Attorney of the original defendant that the Notice of Motion taken out by the Plaintiff was disposed off on 29.8.1998. It appears that Defendant No.2 was served the summons after being arrayed in the suit.

3. On 20.7.2004 when the suit was heard neither the Defendants nor their advocate were present in Court.

The Constituted Attorney of the defendant was also absent on that day. Allegations have been made in the affidavit in support of the Motion that it was on account of the negligence of the advocate that the defendants remained absent and the decree was passed. A further allegation has been made that in all probability the advocate had colluded with the plaintiff in the suit to enable the plaintiff to obtain an ex-parte decree.

4. Although the cause list of 20.7.2004 when the ex-parte decree was passed shows the name of the advocate for the defendant as well as the the names of the defendants, it appears that the decree mentions the name of the original defendant in the cause title. According to the learned advocate appearing for the Defendants all these circumstances indicate that the Court was misled into passing an ex-parte decree.

5. However, without going into these issues regarding the collusion if any between the advocate for the defendants and the Plaintiff, it is obvious that the advocate who appeared when the exparte decree was passed had stated that he had no instructions in the matter. According to the Defendants, certain papers were taken away from the advocate for instituting a suit in the City Civil Court. However, a statement has been made in the affidavit in support of the Motion that the advocate did not inform the defendant of the matter being on board.

6. In my view, the defendant has made out sufficient reasons for restoration of the suit and hence, the Notice of Motion is made absolute in terms of prayer clauses (a) and (b) conditional upon the defendants depositing costs quantified at Rs.5,000/- with the Maharashtra State Legal Services Authority within two weeks from today.

7. Mr.Madon, appearing for the Plaintiffs, seeks a stay of this order for four weeks. However, he states that the Plaintiff will not execute the decree till then. Stay granted for four weeks.